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No. 08-453

IN THE

Supreme Court of the United States

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK,
Petitioner

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI*[1]

Amici are Members of the House of Representatives who are keenly interested in the effect of federal regulatory preemption on the enforcement of consumer protection and fair lending laws. *Amici* are concerned that executive agencies may displace state law or state law enforcement by regulation, even in the absence of clear authority from Congress. *Amici* have witnessed the effect of a regulatory void created by agency preemption in the absence of a robust federal enforcement scheme. Preemption of state law is an important matter that deeply implicates the relations between the state and federal governments. As explained in this brief, A*mici* submit that agency regulations preempting state law are not entitled to *Chevron* deference unless Congress has clearly delegated such authority.

Representative Barney Frank chairs the House Financial Services Committee. He was elected in 1981 and represents the Fourth Congressional District of Massachusetts.

Representative John Conyers, Jr. chairs the House Judiciary Committee. Elected in 1964, Representative Conyers represents the Fourteenth Congressional District of Michigan.

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[1] The parties have consented to the filing of this brief. No party, counsel for a party, or person other than amici or their counsel authored this brief in whole or in part or made a monetary contribution intended to fund itspreparation or submission.

Representative Carolyn B. Maloney is a member of the House Financial Services Committee, and the former chair of the Subcommittee on Financial Institutions and Consumer Credit, which has jurisdiction over national banks and bank regulators. She is also chair of the Joint Economic Committee. Representative Maloney was elected to Congress in 1992, and represents New York's Fourteenth Congressional District.

Representative Melvin L. Watt is a member of both the House Financial Services Committee and the House Judiciary Committee. He chairs the Financial Services Subcommittee on Domestic Monetary Policy and Technology. Representative Watt is also a member of Judiciary Committee Subcommittees on the Constitution, Civil Rights and Civil Liberties, and the Subcommittee on Commercial and Administrative Law. He was elected to Congress in 1992, and represents North Carolina's Twelfth Congressional District.

Representative Luis V. Guttierez also is a member of both the House Financial Services Committee and the House Judiciary Committee. He is the current chair of the Subcommittee on Financial Institutions and Consumer Credit of the Financial Services Committee. Representative Guttierez was elected to Congress in 1992, and represents the Fourth Congressional District of Illinois.

Representative William Lacy Clay, Jr. is a member of the House Financial Services Committee and the Committee on Oversight and Government Reform. He was elected to Congress in 2000, and services the First Congressional District of Missouri.

Mr. Clay served 17 years in the House and Senate of the Missouri State Legislature and chaired the Missouri Senate Banking Committee.

STATEMENT

The Nation is facing an economic crisis. Over the past two years, *amici* have been asked to consider legislation making sweeping changes in the regulation and structure of the financial services sector. Hearings held in connection with such legislation have shown that the absence of effective regulation played a significant role in creating massive portfolios of risky and now "toxic" assets, including mortgage-backed securities. In particular, testimony presented at these hearings have shown that regulators failed to impose restraints on the types of mortgages that could be sold to consumers, with the result that many homebuyers obtained mortgages that they could not repay (or even could be expected to repay).[2] Financial markets also failed to

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[2] *E.g.*, the following hearing testimony available at the Financial Services Committee site (http://financialservices.house.gov/hearings.html): Subprime and Predatory Mortgage Lending: New Regulatory Guidance, Current Market Conditions and Effects on Regulated Financial Institutions: Hearing Before the H. Comm. on Financial Services, Subcomm. on Financial Institutions and Consumer Credit, 110th Cong. (March 27, 2007), (written testimony of Michael D. Calhoun, Center for Responsible Lending, 11-12); Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. On Financial Services, 110th Cong. (June 13, 2007) (written testimony of Steven L. Antonakes, Massachusetts Commissioner of Banks, 6-7); *id.* (written testimony of Thomas J. Miller, Attorney General of Iowa, 7-11); Improving Federal Consumer Protection in Financial Services – Consumer and Industry Perspectives: Hearing Before the H. Comm. on Financial

restrain such doomed transactions because mortgage originators could pass risky loans on to the secondary market, where investors and rating agencies overlooked bad underwriting on the assumption that housing prices would continue to rise, so that the homes could be refinanced or sold at a profit. H.R. Rep. No. 110-619, at 20 (2008); *id.* at 83-84 (dissenting views). The consequences of lending based on an expected rise in asset values rather than the borrower's ability to repay the loan are now evident to all. Foreclosures are devastating entire neighborhoods in many areas of the country. *Id.* at 21 (citing estimate that more than 40 million homes will lose value because of foreclosures).

Neighborhoods with high minority populations have been hit especially hard by home foreclosures.[3]

Services, 110th Cong. (July 25, 2007), (written testimony of Travis B. Plunkett, Legislative Director, Consumer Federation of America).

The Inspector General of the Treasury Department has recently confirmed that OCC's sister agency, the Office of Thrift Supervision, failed to prevent risky lending practices by Indymac Bank. Safety and Soundness: Material Loss Review of Indymac Bank, FSB, 15-30 (OIG-09-032) (Feb. 26, 2009).

[3] Mortgage Lending Disparities: Hearing Before the H. Comm. on Financial Services (Oct. 15, 2007), (testimony of Mass. Gov. Deval Patrick); Effects of the Subprime Mortgage Crisis in New York City and Efforts to Help Struggling Homeowners: Hearing Before the H. Comm. on Financial Services, Subcomm. on Financial Institutions and Consumer Credit, 110th Cong. (Feb. 11, 2008), (testimony of Sarah Gerecke, Chief Executive Officer, Neighborhood Housing Services of New York City); Legislative Proposals on Reforming Mortgage Practices: Hearing Before the, H. Comm. on Financial Services, 110th Cong. (Oct. 24, 2007),

One of the reasons is the high proportion of risky mortgages that were sold to minority borrowers in recent years. Economists have documented the continued existence of a "dual" mortgage market. William Apgar and Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in The Geography of Opportunity: Race and Housing Choice in Metropolitan America 101 (Xavier de Souza Briggs ed., 2005). Today, racial discrimination in lending takes the form of steering borrowers to higher-priced loans as well as outright refusal to lend. *Id.* at 114-15.[4] Consequently, minority borrowers who could qualify for prime mortgages are more likely than white borrowers to turn (or to be steered) to higher-priced subprime loans. The higher interest payments on subprime loans (after the expiration of "teaser" rates) mean a greater risk of default and foreclosure if the homeowner loses income through illness or unemployment.

(testimony of Hilary Shelton, Director, Washington Bureau of NAACP).

[4] *See also* Mortgage Lending Disparities: Hearing Before the H. Comm. on Financial Services, 110th Cong. (Oct. 15, 2007) (written testimony of Jim Campen, Executive Director, Americans for Fairness in Lending, "Persistent Patterns and Industry Changes: Mortgage Lending Disparities in Greater Boston," 4-7); National Community Reinvestment Coalition, Income is No Shield Against Racial Differences in Lending (July 2007) (available at http://www.ncrc.org/index.php?option=com_content&task=view&id=231&Itemid=76); National Community Reinvestment Coalition, Income is No Shield Against Racial Differences in Lending II (July 2008) (available at http://www.ncrc.org/index.php?option=com_content&task=view&id=362&Itemid=88).

There is no dispute that the states have the authority to enact consumer protection and fair lending laws that apply to national banks. In informal opinions as well as regulations, however, the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) have broadly opposed the enforcement of state consumer protection and fair lending laws against national banks and thrifts. Courts have deferred to such rulings as the basis for disapproving state legislation and enforcement actions under existing state laws.[5] Although OCC contends that it is solely responsible for applying state fair lending and consumer protection laws to national banks, its internal manual for conducting fair lending investigations makes no reference to state law. OCC, Fair Lending Examination Procedures, Comptroller's Handbook (April 2006). Likewise, a General Accountability Office study reported that OCC examiners stated "that they generally did not have procedures for examining compliance with state laws." GAO, OCC Preemption Rules: OCC Should Further Clarify the

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[5] The scope of agency-advocated preemption is illustrated by several recent cases in which courts have extended federal preemption to non-banks acting as agents of banks. *See, e.g., Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341 (2d Cir. 2008) (application of state law limiting interest on tax refund anticipation loans preempted as to tax preparation firm); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 188 (2d Cir. 2007) (state regulation of gift card fees by agents of banks); *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007) (same); *State Farm Bank, FSB v. Reardon*, 539 F.3d 336 (6th Cir. 2008) (state mortgage broker registration requirements preempted as to insurance agents acting on behalf of State Farm Bank).

Applicability of State Consumer Protection Laws to National Banks 23 (April 2006).[6] OCC created a regulatory vacuum.[7]

In 2005, after reviewing data disclosed pursuant to the Home Mortgage Disclosure Act (HMDA), the New York Attorney General requested information from four national banks concerning apparent racial disparities in mortgage lending. The letters invoked the Attorney General's authority to investigate violations of New York Executive Law § 296-a. The Clearing House Association and OCC filed suit to enjoin the Attorney General's fair lending investigation. Although the OCC itself agrees that investigation is warranted "where preliminary analysis of the HMDA data indicates elevated levels of fair lending risk,"[8] OCC made no claim that it was investigating the four banks for fair lending violations. Nor did OCC offer any concrete reason to

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[6] *See also* Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearing Before the Subcomm. on Oversight and Investigations, H. Comm. on Financial Services, 110th Cong. (July 25, 2007) (prepared testimony of Calvin Hagins, OCC Director for Compliance Policy, describing examination procedures) (Hagins testimony).

[7] Even if OCC had been more zealous in exercising its concurrent enforcement authority, there would still be a gap because OCC's enforcement power under 12 U.S.C. § 1818 is more limited than the powers state officials typically have to enforce state law. *Cf. Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008) (declining to read Clean Water Act as displacing federal common law punitive damages remedy and rejecting attempt to sever remedies from their cause of action).

[8] Hagins testimony at 2.

believe the New York Attorney General's investigation would interfere with its examination of the banks or with the banks' exercise of their federal banking powers.

Relying on an OCC regulation (12 C.F.R. § 7.4000) that purported to forbid state enforcement, *inter alia*, of state fair lending laws as "visitation" of national banks, the district court enjoined the investigation, and a divided panel of the Second Circuit affirmed. Pet. App. 2a-62a. The Second Circuit explicitly extended *Chevron* deference to OCC's interpretation of the governing statute (12 U.S.C. § 484). Pet. App. 31a.

SUMMARY OF THE ARGUMENT

Agency authority to preempt state law comes from Congress. The injunction forbidding the New York Attorney General's fair lending investigation rests not on the Second Circuit's own reading of an enactment of Congress and the application of constitutional preemption standards to a congressional decision to displace state law, but rather on *Chevron* deference to a 2004 OCC regulation (12 C.F.R. § 7.4000) forbidding state enforcement of non-discriminatory state laws of general application against national banks. Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004). Unlike regulations that may have the effect of preempting state law when courts apply established constitutional standards, OCC's visitorial powers regulation purports to decide the scope of preemption for itself. The power to decide the preemptive meaning of a statute is different from the power to

decide its substantive meaning. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996).

The Second Circuit below erred in extending *Chevron* deference to OCC's view of its own preemption authority because Congress never gave OCC policymaking discretion with regard to preemption. Preemption of state law is an important constitutional question, distinct from the agency's regulatory task. *Cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) (Judicial Review) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration") (citation omitted). Such authority is not implicit in general agency authority to issue regulations.

The Second Circuit's error in applying *Chevron* deference is dispositive. The text and history of the statute granting OCC exclusive visitorial power over national banks does not support OCC's position. Moreover, this Court's decisions are inconsistent with OCC's view that all state regulation is impermissible visitation. In addition, the Second Circuit's decision ignores the checks this Court has imposed to ensure that congressional intent to displace state law is not lightly inferred. For Congress to broadly displace state regulatory enforcement by statute (as OCC has tried to do by regulation), a showing of "clear and manifest" intent to preempt the field is required. No less must be required to delegate preemption decisions across a field to an agency. Unlike Congress, which is politically accountable to the

states, agencies are comparatively insulated from such political accountability. Courts must therefore be no less protective of state interests when considering whether a statute allows an agency to make preemption calls than when considering whether Congress has directly preempted the field. Applying *Chevron* deference to such regulations would shift control over sensitive and constitutionally important relations between the federal and state governments from Congress, which is by constitutional design politically responsive to state concerns, to executive agencies which by design are insulated from them.

ARGUMENT

AN ADMINISTRATIVE AGENCY CANNOT FORBID STATE ENFORCEMENT OF NON-CONFLICTING AND NON-DISCRIMINATORY STATE LAW WITHOUT A CLEAR STATEMENT OF AUTHORITY FROM CONGRESS

The Supremacy Clause gives Congress the power to pass laws that trump conflicting state laws. Congress may choose to exercise that authority broadly, by carving out an entire legal domain for exclusively federal administration (field preemption), or more narrowly by enacting provisions eclipsing state laws that interfere with or frustrate the federal scheme (conflict preemption). Sometimes Congress explicitly addresses the preemptive effect of a law, for example, by "saving" state laws from preemption. More often, preemption follows from the predictable application by courts of legal rules that, broadly stated, weigh state and federal interests to determine whether the laws of both sovereigns may be

preserved. The question in this case is whether Congress also may preempt unwittingly by granting an agency general authority to issue regulations, if the agency then deploys its regulatory power to make preemption decisions Congress itself did not consider.

The OCC regulation at issue in this case is an example of a deregulatory preemption power asserted by a number of federal agencies in recent years. When agencies forbid state regulation in the absence of an effective federal regulatory regime the result can be, and was in this instance, a regulatory void. The exercise of preemption authority by federal agencies threatens the historic role of the states as "laboratories" to test solutions to new problems that Congress has not yet addressed legislatively. It also reduces the regulatory resources that are available to combat misconduct, disabling state agencies that often are more aware of and responsive to individual complaints than federal regulators.

A. Congress Did Not Preempt All State Regulation of National Banks.

Congress did not occupy the field of national bank regulation. Only five years after Congress enacted the National Bank Act (NBA), this Court explained that national banks "are subject to the laws of the State and are governed in their daily course of business far more by the laws of the State than of the nation." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869). "This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." *Anderson Nat'l Bank v. Luckett*,

321 U.S. 233, 248 (1944). The national banking system was not premised on a set of comprehensive and uniform federal rules for national banks. Indeed, OCC would agree that adherence to state laws governing contracts, mortgages, foreclosures, security interests, and the like is vital to the operation of national banks, even though such laws vary from state to state.[9] To be sure, this Court also has extended protection to national banks against discriminatory state law, assuring that national banks may compete on equal terms with state-chartered banks. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003) (noting protection of national banks from "possibly unfriendly State legislation"). But states may nevertheless enforce generally applicable state laws against state and federally-chartered banks alike, "to the extent such laws do not conflict with the letter or the general purposes of the NBA." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).

Congress also did not strip states of the power to enforce their laws against national banks (and

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[9] OCC contends that the hallmark of the "dual banking system" is the "uniformity of the standards" that govern national banks. 69 Fed. Reg. at 1896. However, OCC concedes that many state laws have always applied to national banks. *Id.* OCC attempts to draw a line between state laws that it deems the "infrastructure" of banking (which are not preempted), and other laws states may not enforce. But there is no principled distinction between "debt collection" laws which are deemed "infrastructure," and consumer protection laws, which are preempted as state regulation. *Id.* Similarly, OCC does not explain why subjecting national banks to state-enforced criminal laws squares with exclusive OCC visitation, but not state enforcement of regulations backed by non-criminal sanctions.

thereby occupy the field indirectly) by conferring exclusive "visitorial" power on the Comptroller of the Currency. The Comptroller's exclusive power of visitation, codified today at 12 U.S.C. § 484, was compatible with continued state regulation of national banks because not all regulation of banking is visitation. As explained in Petitioner's brief at pages 1-5 and 22-26, Congress used a customary term of corporate governance to refer to the examination of a bank for safety and soundness in compliance with its charter. "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of *its* laws and regulations." *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (emphasis added).[10] *See generally* Roscoe Pound, *Visitorial Jurisdiction over Corporations in Equity*, 49 Harv. L. Rev. 369, 389-90 (1936). There is no conflict between exclusively federal visitation to enforce the NBA charter and inspection of bank records to enforce compliance with distinct legal requirements. Indeed, *Guthrie* held that the NBA did not preempt a shareholder's suit in state court to enforce his right to inspect the books and records of a national bank because such an action is not a form of "visitation." *Guthrie* refutes the claim that any inspection of

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[10] *Guthrie* cited with approval *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740-41 (C.C.N.D. Oh. 1881), which held that a state's request for information about depositors to enforce its tax laws was not prohibited "visitation." *Guthrie*, 199 U.S. at 158. Tellingly, in its discussion of Guthrie, OCC paraphrased the quotation as "*the* laws and regulations." 69 Fed. Reg. at 1899 (emphasis added).

national bank records other than by OCC is forbidden by the National Bank Act.[11]

The Court's decisions in *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), and *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944), show that states could enforce generally applicable state laws against national banks without interfering with the Comptroller's visitorial powers. In the *St. Louis* case, the Court upheld Missouri's lawsuit to enforce its prohibition against intrastate branching against a national bank. The fact that national banks did not then have affirmative power to establish interstate branches was relevant to whether the state prohibition was substantively preempted by federal law, but it was not relevant to whether the state (rather than the Comptroller) could bring an action to enforce non-preempted state law. After concluding that the state law was valid and did not conflict with federal law, the Court concluded as an obvious corollary that, "since the sanction behind it is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter." 263 U.S. at 660. OCC's position that state enforcement of state law through a judicial proceeding is impermissible visitation cannot be reconciled with the Court's decision in *First Nat'l Bank in St. Louis v. Missouri*.

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[11] *Guthrie*, of course, involved a private civil action, not enforcement of state law by state officials. But it is hard to see why judicial enforcement of state law is less intrusive when sought by an individual rather than by the state. This Court has often equated private civil enforcement with state regulation. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

In *Anderson*, the Court held that states could apply their unclaimed property laws to national banks. The Court expressly held that the state could "incident to this exercise of authority, require the banks to file reports of inactive accounts," 321 U.S. at 253, i.e., could demand production of bank records. That decision preceded by 38 years the enactment of a statutory exception to the Comptroller's visitorial powers for state escheat laws (12 U.S.C. § 484(b)).[12] The statute simply amplifies a longstanding judicial interpretation in order to quell disputes about the scope of state enforcement. Rather than implying that the scope of "visitation" is so broad that it would forbid state enforcement of unclaimed property laws if not for a statutory exception, the 1982 amendment shows that Congress ratified the Court's narrower interpretation of "visitation" that left ample room for state enforcement of state law.[13]

The 1994 Riegle-Neal Act confirms that OCC's exclusive visitorial power did not eclipse all state regulation. In Riegle-Neal, Congress explicitly provided that "[t]he laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-state national bank," except when otherwise

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[12] The Oregon Supreme Court had previously so held. *State v. First Nat'l Bank of Portland*, 123 P. 712 (Or. 1912).

[13] The OCC's explanation for the visitorial powers regulation erroneously relies on the 1982 amendment as support for its broad preemption claim. 69 Fed. Reg. at 1897. The OCC's Brief in Opposition to certiorari repeats this erroneous argument. BIO at 13, n.4. Neither discusses *Anderson*.

preempted. 12 U.S.C. § 36(f)(1)(A). Because the OCC had previously taken the position that it could not enforce state law, Congress clarified that "[t]he provisions of any State law to which a branch of a national bank is subject . . . shall be enforced, with respect to such branch, by the Comptroller of the Currency." 12 U.S.C. § 36(f)(1)(B). Nothing in the text of the statute indicates that Congress intended OCC enforcement to be exclusive.

The legislative history of the Riegle-Neal Act also confirms that Congress did not intend to eliminate state regulatory authority over national banks. "States have a strong interest in the activities and operations of depository institutions doing business in their jurisdictions, regardless of the type of charter the institution holds." H.R. Conf. Rep. 103-651, 45 (1994). The report discussed the application of conflict preemption to state law. "In this regard, the impact of a State law on the safe and sound operations of a national bank is one factor that may be taken into account in considering whether Federal law preempts state law. Courts generally use a rule of construction that avoids finding a conflict between Federal and State law where possible. This title does not change these judicially established principles." *Id.* The report went on to fault OCC for its overly aggressive assertion of federal preemption to block state consumer protection enforcement, (*id.*) -- a criticism that is incompatible with the claim that Congress intended to vest sole consumer protection enforcement power in OCC to the exclusion of the states.[14]

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[14] *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980), had previously held that New Jersey's anti-redlining law applied

B. *Chevron* Deference is Not Owed to An Agency's View of Its Statutory Authority to Preempt.

The rationale for *Chevron* deference to agency decision-making is not always clear in this Court's cases. *See* Judicial Review, at 369 (describing interpretive and law declaring approaches). Some opinions can be read to suggest a broad quasi-judicial interpretive role, in which agencies authoritatively construe ambiguous statutory terms. That rationale, however, conflicts with the rationale of the Court's decision in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), because giving precedence to agency interpretations that conflict with judicial rulings would encroach on the judicial power "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Chevron deference, properly understood, must be grounded in the policymaking discretion conferred by Congress when it deliberately leaves gaps in statutory schemes to be filled in by agencies, the same rationale this Court adopted when it held that

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to a national bank (except for certain reporting requirements substantively preempted by HMDA), but that only OCC could enforce as to national banks. The Third Circuit deferred to an interpretative ruling by the OCC which the court deemed, in the circumstances of the case, to be a "reasonable interpretation of the National Bank Act." 630 F.2d at 989. Nothing in the text or the legislative history of the Riegle-Neal Act indicates that Congress approved of and intended to codify a single judicial decision relying on OCC's own preemption analysis. *Long* also cannot be said to have "settled the meaning of an existing statutory provision." *United States v. Hayes*, No. 07-608, slip op. at 8 (Feb. 24, 2009) (citations omitted).

regulations could preempt state law. *United States v. Shimer*, 367 U.S. 374, 383 (1961) (an agency may promulgate a regulation having the force of law and thereby preempting contrary state law); *Chevron, U.S.A., Inc., v.* NRDC, Inc., 467 U.S. 837, 843-45 (1984) (citing *Shimer* at 845). Under that analysis, unless Congress has intentionally and explicitly conferred policy-making discretion with regard to the preemption of state law, as discussed in section C, below, no deference is owed to an agency's decisions regarding preemption.

1. "The whole point of *Chevron* is to leave the discretion provided by the ambiguities of the statute with the implementing agency." *United States v. Eurodif, S.A.*, 129 S. Ct. 878, 887 (2009) (quoting *Smiley v. Citibank,* 517 U.S. 735, 742 (1996)). The power to execute federal law "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2345 (2007) (citations omitted). *See also Zuni Public Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 550 U.S. 81 (2007) (regulation involves the kind of "highly technical, specialized . . . matter that Congress often does not decide itself, but delegates to specialized agencies to decide."). In short, *Chevron* is explained by deference to determinations Congress did not make itself, but rather left open to the agency. *Chevron,* , 467 U.S. at, 843.

Nothing in *Chevron* requires the courts to abdicate their own constitutional authority "to say what the law is." *Marbury v. Madison*, 5 U.S. 137,

177 (1803). *Chevron* notes that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. at 843 n.9. *Cf.* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 215 & n.54 (2001); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 476 (1989); Judicial Review, at 381 ("If taken literally, the Court's language suggests a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or administrative perspective.")

This Court's decision in *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967 (2005), necessarily depends on deference based on discretionary policymaking rather than to an agency's interpretation of the meaning of a statute. In *Brand X*, the Court deferred to the FCC's determination that cable Internet services should be regulated as "information services" rather than "telecommunications services." Along the way, the Court ruled that an agency's prior adoption of an inconsistent position "is not invalidating" (quoting *Smiley*, 517 U.S. at 742), and that an agency is free to update or modify its regulations based on changed circumstances or a change in administrations. *Id.* at 81. Since new facts or a new administration cannot possibly change what Congress meant when it passed a law, it is clear that *Chevron* deference is about discretion to make policy judgments that may change with circumstances, rather than to interpretations of

statutory language that do not.[15] An explication of a new policy in light of new facts, for example, need not contradict the old policy. *Chevron* operates in a realm where there is no one right answer, because Congress deliberately left its meaning uncertain.

The same conclusion about the nature of *Chevron* deference follows from the Court's holding in *Brand X* that a court must defer to an agency under *Chevron* even if the court has previously adopted a different interpretation of the same statute. The judicial power of the United States resides in the Article III courts, and courts are not subject to overruling by Article II agencies on questions of federal law. But questions that Congress has left open for agency policymaking cannot be given a fixed interpretation by a court, any more than by an agency. An agency's subsequent policy decision can trump a court's prior analysis of a statute precisely because Congress has given the agency policy discretion to make rather than interpret law.

2. *Chevron* deference does not apply to OCC's visitorial powers regulation because Congress did not give OCC discretion to make its own preemption policy. "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers

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[15] Indeed, this Court has repeatedly observed that for courts, "[c]onsiderations of stare decisis are particularly forceful in the area of statutory construction," because Congress can legislate to overturn an interpretation with which it disagrees. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

power upon it." *City of New York v. FCC*, 486 U.S. 57, 66 (1988) (quoting *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). Congress enacted a statute giving OCC the general power to issue regulations. 12 U.S.C. § 93a.[16] That statute does not refer to preemption and it confers no authority to decide preemption issues. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (delegation to Secretary of Labor did not encompass authority to decide whether federal right of action preempted conflicting state workers' compensation laws).

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[16] Section 93a provides:

> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

Because section 36 is excluded, the OCC visitorial powers regulation cannot be defended as an implementation of the provisions of 12 U.S.C. § 36(f) regarding OCC enforcement of state fair lending laws. Other Riegle-Neal provisions confirm that Congress did not intend to delegate authority to OCC to promulgate regulations having the force of law (and subject to *Chevron* deference) regarding preemption. 12 U.S.C. § 36(f)(1)(C) requires OCC to report on actions concerning the application of state law. 12 U.S.C. § 43 in turn refers to OCC opinions and interpretive rules concerning preemption, not to regulations having the force of law. Congress expected OCC to continue its practice of issuing such opinions and interpretive rules, rather than to short-circuit judicial analysis by issuing regulations.

Congress' use of the term "visitation" – even if ambiguous -- does not imply that Congress wanted OCC to decide for itself whether states could enforce state laws applicable to national banks. "*Chevron* deference is not accorded merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 245, (2006). It follows from the analysis in section B.1 above that statutory ambiguity is not enough, by itself, to trigger *Chevron* deference. Congress at times enacts provisions of less-than-perfect clarity without intending any delegation of policymaking authority. *See, e.g., United States v. Hayes*, No. 07-608, slip op. at 6-7 (Feb. 24, 2009) (noting "less-than meticulous-drafting"). The ultimate question is whether Congress intended to leave certain matters undecided for resolution by the agency, not whether Congress could have drafted the statute better.

As this Court explained in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), some matters are too important be infer that Congress implicitly delegated their resolution to an agency by ambiguous language. "In extraordinary cases," the Court noted, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* (citation omitted). There is such a reason to hesitate before inferring that Congress intended to delegate power to an agency to alter the balance between the state and federal governments by preempting state law. Having chosen to create a national banking system that remained substantially governed by state law (and, indeed, expressly to make certain state law applicable to national banks), "Congress could not

have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160 (citation omitted).

Decisions to preempt state law (or a state's enforcement of its own law) by regulation are different from the adoption of regulatory standards that may have a preemptive effect. Equating the visitorial powers regulation with the more typical regulatory standard that has a preemptive effect, "confuses the question of the substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive." *Smiley,* 517 U.S. at 744. In *Smiley,* the Court "assume[d] (without deciding) that the latter question must always be decided de novo by the courts." *Id.* When the regulation operates directly on state law (as the visitorial powers regulation does by forbidding state enforcement) the agency itself is deciding the preemptive meaning of the statute. Put bluntly, the OCC visitorial powers regulation regulates states, not banks.[17]

References to agency intent to preempt in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), and *City of New York v. FCC*, 486 U.S. 57 (1988), do not suggest that courts must defer to an agency's view of its authority to issue preemption-deciding regulations. The policymaking discretion involved in *de la Cuesta* and *City of New*

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[17] For this reason, the statement in *de la Cuesta* that, "[a] preemptive regulation's force does not depend on express congressional authorization to displace state law," 458 U.S. at 154, does not apply to the OCC visitorial powers regulation.

York was the discretion to adopt uniform regulatory standards. There was no question in either case about whether Congress had intended to give the agency the authority to adopt national standards that would thereby preempt contrary state law. *City of New York*, 486 U.S. at 66-67 (Congress ratified FCC's practice of preempting local technical standards for cable service); *de la Cuesta*, 458 U.S. at 162 ("statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law."). However, Congress foreclosed adoption of uniform national standards like those adopted in *de la Cuesta* and *City of New York*, when it made state consumer protection and fair lending laws applicable to national banks, so delegated authority to preempt cannot be predicated on standard-setting power.

In *de la Cuesta t*he Court held that a Federal Home Loan Bank Board regulation authorizing federal thrifts to include "due on sale" clauses preempted California law limiting enforcement of such clauses. Likewise, in *City of New York*, the Court held that FCC regulations establishing uniform national cable television standards preempted different local standards. The agency intent to preempt discussed in those cases is just another way of asking whether state law conflicted with the purpose of the regulation (triggering "obstacle" preemption), because it was *possible* to comply with both the state law and federal regulations. In *de la Cuesta*, the agency concluded that elimination of "due on sale clauses" would "have an adverse [effect] on the earning power and financial stability of Federal associations," and would dry up

mortgage credit. 458 U.S. at 168. The California law conflicted with the federal regulation because it denied federal thrifts "flexibility" in mortgage lending that the agency had intended to protect. Similarly, in *City of New York*, the FCC explicitly adopted standards that were intended to be uniform across the nation to avoid the "serious negative consequences" of technical standards that varied from place to place. 486 U.S. at 65. In that context, deference to "the agency's choice to pre-empt" refers to the choice to adopt a uniform standard, not to decide for itself the preemptive consequence of that standard.

3. Even if *Chevron* deference were rooted in agency expertise rather than delegated statutory gap-filling, there would be no reason to defer to OCC's regulation. OCC "accretes a great deal of regulatory authority to itself at the expense of the states through rulemaking lacking any real intellectual rigor or depth." Pet. App. 26a; *id.* (referring to the regulation as "at or near the outer limits" of *Chevron*). OCC has no expertise in constitutional adjudication, including the application of the Supremacy Clause to conflicts between federal and state law. *Id.* at 25a. Nor is agency banking expertise involved. As the Second Circuit noted, OCC's rationale for the regulation is not rooted in its experience with the examination of national banks. Pet. App. 25a. OCC has not claimed that legitimate state fair lending investigations would impede the banking activities of national banks. Nor does OCC claim that such investigations have interfered with its own visitorial functions.

C. Agencies Lack the Authority to Issue Regulations That Decide the Scope of Preemption Unless Congress Has Expressly Authorized Such Regulations.

The same clear statement rules should apply to statutes that are invoked as agency authority to explicitly preempt state law as apply to field preemption. The authority to fill statutory gaps with regulations must originate with Congress. A delegation of authority to an agency to dictate by regulation what non-conflicting state laws are preempted is really a form of field preemption, because the agency then has policymaking discretion to preempt (or not) any state law within the scope of the delegation. The form of preemption asserted by OCC, in particular, is based on the claim that Congress has preempted the entire field of state enforcement by conferring exclusive "visitorial" power on OCC. Because States traditionally have the responsibility for enforcing their own laws, and there is no claim (in light of the explicit contrary language in the Riegle-Neal Act) that the state laws themselves are preempted, "clear and manifest" congressional intent is required to preempt the field of state enforcement. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002) (citation omitted) (standard for preempting a traditional field of state concern). Section A shows that Congress did not intend to occupy the entire field of banking regulation, leaving ample room outside OCC visitation for regulatory enforcement by the states.

No less clarity must be required of Congress when it preempts a field by authorizing agency preemption than when it does so directly. A general statute authorizing an agency to promulgate regulations, like 12 U.S.C. § 93a, does not imply that "clear and manifest" intent to allow an agency to decide whether state laws are preempted. Allowing agencies to exercise such authority in the absence of an explicit grant of preemptive power by Congress would weaken an important structural constitutional protection of state sovereignty, because that would allow agencies to make preemption decisions even if Congress never considered the matter. Agencies lack the "procedural safeguards" inherent in the constitutional structure of the Congress to protect state interests.

In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-52 (1985), the Court recognized that the composition of Congress, and, in particular, the election of Senators as representatives of the States, helps to assure that state interests are given appropriate weight in federal legislation. *See also United States v. Morrison*, 529 U.S. 598, 628, 649 (2000) (Souter, J., dissenting). Members of Congress often have served in state offices before and after congressional service, and may have close political and personal ties to state officials. Perhaps even more important, members of Congress are elected by, and therefore politically accountable to, the same voters who elect the state legislators whose enactments would be preempted, denying those voters state law protections.

Whether or not the structural safeguards against congressional infringement of state sovereignty are deemed sufficient for all purposes, those safeguards are much more protective of state interests than the indirect responsiveness of federal agency officials by virtue of their accountability to the President and to Congress. Even the most senior agency officials are several steps removed from the states. *See* Barron & Kagan, at 243-44 (describing political accountability of the most senior agency officials). Rulemaking requirements such as Executive Order 13132, requiring agencies to discuss the federalism implications of a rule, have had little effect, as illustrated by OCC's pallid treatment of state interests in its discussion of the visitorial powers rule. 69 Fed. Reg. at 1903. *See* Nina Mendelson, *A Presumption Against Preemption*, 102 Nw. U. L. Rev. 695, 718-21 (2008).

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Congress itself, not the agency, must decide if state laws should give way to a federal scheme. Agency preemptive rulemaking may operate only within the interstices of a statute that clearly confers such authority.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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